Supreme Court, U. S.
FILED
JUN 2 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

_____ TERM, 1976

No. 75-1748

DENISE DONAHEY,

Petitioner

vs.

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARTHUR B. STARK, Esq.
KOEPPEL, STARK & NEWMARK
Attorneys for Petitioner
1135 Alfred I. DuPont Bldg.
Miami, Florida 33131;
379-1403

MIAMI REVIEW — 371-4853 — 377-3721

CONTENTS

	Page
INDEX TO APPENDIX	ii
AUTHORITIES CITED	iii
PETITION	1
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISION INVOLVED	6
STATEMENT OF CASE	6
REASONS FOR GRANTING WRIT	11
CONCLUSION	33
CERTIFICATE OF SERVICE	34

INDEX TO APPENDIX

United States vs. Donahey—Fifth Circuit—
Opinion 75-2376, April 5, 1976 ..... Appendix A

Judgment—United States vs. Donahey
No. 75-2376, April 5, 1976 ..... Appendix B

Order Denying Petition For Re-Hearing
No. 75-2376, May 3, 1976 ..... Appendix C

United States vs. Donahey
Order Granting Stay of Issuance of Mandate,
Case No. 75-2376, May 17, 1976 ..... Appendix D

AUTHORITIES CITED

Pages

Constitution

Fifth Amendment of the Constitution of
the United States 6

Statutes

Title 18 U.S. Code § 6002 22

Cases

Santabello vs. New York, 92 S.Ct. 495, 404, US 254 18

State of Florida v. Davis, 188 So.2d, 24 18

United States vs. Brown, 505 Fed.2nd, 375 18

United States vs. Christman, 298 Fed.2d, 651 32

United States vs. Donahey 529 Fed.2nd. 831,
Case #75-2376 ..... 2, 20

United States vs. Dionisio, 410 U.S. 1, 93 S.Ct. 764 .. 27

United States vs. Goodrich, 493, Fed.2nd 390 19

United States vs. Lasaiandra, 421, Fed.2, 1261 32

United States vs. Levy, 153, So.2nd, 995 22

United States vs. Mandujano, __ U.S. __
No. 74-754, May 19, 1976 ..... 24, 28

in the

Supreme Court

of the

United States

_____ TERM, 1976

_____

NO. _____

_____

DENISE DONAHEY,

Petitioner

vs.

THE UNITED STATES OF AMERICA

Respondent

_____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

The Petitioner, DENISE DONAHEY requests that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered April 5th, 1976, and the Petition for re-hearing which was denied on May 3, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit reported at 529 Fed 2d 831 Case # 75-2376 reported April 5, 1976 is attached hereto and made a part of as Appendix "A". The judgment of said court reported April 5, 1976 is attached hereto as Appendix B. The order denying Petition for Re-Hearing dated May 3, 1976, is attached hereto as Appendix "C." The order granting Petitioner's Application to Stay the Mandate dated May 14, 1976, is attached hereto as Petitioner's Appendix "D".

JURISDICTION

The opinion and judgment of the United States District Court of Appeals for the Fifth Circuit was made and entered on April 5, 1976 (See Petitioner's Appendix "A" and "B"). The Order of the United States Court of Appeals of the Fifth Circuit denying Petition for Re-Hearing was made and entered May 3, 1976, (See Petitioner's Appendix "C"). The Order granting Petitioner's Application For A Stay of Mandate dated May 14th, 1976 (See Petitioner's Appendix "D").

The jurisdiction of this case is invoked under title 28 U.S.C. 1254.(1) and Rule 19 of the Supreme Court Rules. The opinion and judgment of the United States Court of Appeals for the Fifth Circuit and the Order denying the Petition for Re-Hearing therein should be reviewed for the following reasons:

(a) They are in direct conflict with the decision of another Court of Appeals on the same matter,

(b) Have decided an important question of federal law which has not been, but should be settled by this court

(c) Have decided a federal question in a way in conflict with the applicable decisions of this court

(d) Have so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned a departure by a lower court as to call for an exercise of this court's power of supervision.

Therefore the jurisdiction of this court is invoked.

QUESTIONS PRESENTED

1. *PLEA BARGAINING AGREEMENT*

DID THE CIRCUIT COURT OF APPEALS COMMIT ERROR BY NOT REQUIRING THE GOVERNMENT TO SPECIFICALLY PERFORM UNDER THE TERMS AND CONDITIONS OF THAT CERTAIN "PLEA BARGAINING AGREEMENT" ENTERED INTO WITH THE DEFENDANT, DENISE DONAHEY, ON OCTOBER 17, 1974, AND/OR IN THE ALTERNATIVE, BY NOT DISMISSING THE INDICTMENT?

2. *EQUITABLE IMMUNITY*

THAT PURSUANT TO AND IN RELIANCE UPON THE TERMS AND CONDITIONS OF

SAID "PLEA BARGAINING AGREEMENT" WHEN THE PETITIONER TESTIFIED FULLY BEFORE THE GRAND JURY (33 PAGES OF TESTIMONY) WITHOUT ANY CAUTIONARY WARNINGS WHATSOEVER, WAS SHE NOT GRANTED EQUITABLE IMMUNITY?

3. *NO CAUTIONARY WARNINGS*

THAT WHEN PETITIONER TESTIFIED BEFORE THE GRAND JURY UNDER THE FACTS AND CIRCUMSTANCES OF THE HEREIN CASE WITHOUT ANY CAUTIONARY WARNINGS INFORMING HER OF HER FIFTH AMENDMENT RIGHTS, WAS THIS IN FACT "HARMLESS ERROR" AS CHARACTERIZED BY THE CIRCUIT COURT OF APPEALS IN ITS OPINION?

4. *PETITIONER'S GRAND JURY TESTIMONY AND INDICTMENT*

DID THE GOVERNMENT'S STATEMENT TO THE GRAND JURY,

> "I WOULD PLEASE ASK WHEN YOU CONSIDER THIS INDICTMENT THAT YOU COMPLETELY DISREGARD THE TESTIMONY OF MISS DONAHEY WHEN SHE TESTIFIED BEFORE YOU PREVIOUSLY AND PLEASE BASE YOUR CONSIDERATION *SOLELY ON THE TESTIMONY OF THE INVESTIGATION AS RELATED BY MR. PUTSCHE.*"

SO PREJUDICE THE PETITIONER'S RIGHTS BEFORE THE GRAND JURY AND INFECT THEIR DELIBERATIONS TO SUCH A DEGREE THAT SHE DID NOT RECEIVE FAIR AND IMPARTIAL CONSIDERATION BEFORE SAID GRAND JURY IN VIOLATION OF RIGHTS GUARANTEED TO HER UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

5. *POST JURY INQUIRY*

UNDER THE FACTS AND CIRCUMSTANCES OF THE INSTANT CASE, WAS NOT ERROR COMMITTED BY AN IMPROPER ANSWER TO THE FOLLOWING POST INSTRUCTION INQUIRY BY THE JURY

> "IS IT NECESSARY UNDER THE INTERPRETATION OF THE LAW FOR THE JURY TO DETERMINE WHETHER THE DEFENDANT KNEW: (1) THE SMUGGLED SUBSTANCE WAS A *CONTROLLED SUBSTANCE*, OR (2) THE SMUGGLED SUBSTANCE WAS *COCAINE?* IN ORDER TO DETERMINE GUILT TO EACH COUNT IN THE INDICTMENT?"

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution:

U.S.C.A. CONST. AMDT. 5.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

This was a criminal appeal from the United States District Court for the Southern District of Florida, to the United States Court of Appeals for the Fifth Circuit. The parties will be referred to as Petitioner and Respondent respectively and the following symbols will be used: "R" for Record on Appeal; "SR" for Supplemental Record on Appeal; and "A" for Appendix. All italics have been supplied by this writer for emphasis.

On October 13, 1974, at approximately 3:00 p.m., the Petitioner MISS DENISE DONAHEY, a twenty-three year old department store employee from Cleveland, Ohio,

was detained in the United States Customs enclosure located in the Miami International Airport at Miami, Florida. She was returning to the United States from a short vacation trip to Bogota, Colombia, with her travelling companion, MISS LORETTA BURNS. A United States Customs Agent examined MISS DONAHEY'S Tote bag and discovered a quantity of cocaine sewed into the lining thereof. She was thereupon arrested.

Shortly thereafter, MISS DONAHEY agreed to cooperate with agents of the Drug Enforcement Administration in the prosecution of one VINCENT MAROTTA (R, Vol. 2, Donahey's statement, pgs. 62-66; A.), the prime suspect in this case (SR, Agent Putsche's testimony, pg 14), who planned and financed this South American trip for MISS DONAHEY AND MISS BURNS.

VINCENT MAROTTA is a prominent businessman from Cleveland who is the principle owner of North American Systems which distributes "Mr. Coffee" machines on a nationwide basis. (R, Vol. 2, pg. 67.)

Pursuant to prior arrangements MISS DONAHEY had made with MAROTTA, DONAHEY and BURNS were checked into the Marriott Hotel near the airport by agents of the Drug Enforcement Administration in an effort to have MAROTTA or one of his cohorts make contact with DONAHEY.

During the 48 hour period which ensued, no contact was made on behalf of MAROTTA, however, MISS DONAHEY on several occasions attempted to telephone him in Cleveland and he would not accept her calls. A Drug Enforecement Administration agent, posing as an insurance

salesman, made a telephone call to MAROTTA'S Office which he accepted. MISS DONAHEY was then put on the line and after telling MAROTTA she was arrested in Miami with his cocaine, MAROTTA made no response to this and after a two minute pause hung up the telephone. (R, Vol. 2, Pgs. 73 & 74; SR, Agent Putsche's testimony).

On October 17, 1974, the Government entered into a "PLEA BARGAINING AGREEMENT" with DENISE DONAHEY which provided as follows:

> "DENISE DONAHEY hereby agrees to testify before the Federal Grand Jury and to cooperate fully with the United States Attorney and Government Agents concerning the prosecution of VINCENT MAROTTA. In return, the United States Attorney agrees to permit DENISE DONAHEY to plead guilty pursuant to *Alford v. North Carolina*, to a misdemeanour count, 21 U.S.C. §844. The Government will recommend that she be sentenced to one year probation.
>
> Signed: DONALD L. FERGUSON
> Assistant U.S. Attorney
>
> Dated: October 17, 1974"

(R, Vol. 1, pg. 28; A. pg. 1)

MISS BURNS was not charged with any offense and there is no prosecution pending against her.

That in reliance upon the inducements and representations of the "PLEA BARGAINING AGREEMENT", on October 18, 1974, DENISE DONAHEY did appear and

testify before the Federal Grand Jury, Southern District of Florida, without receiving any cautionary instructions whatsoever; her testimony consisted of approximately 33 pages. (R, Vol. 1, pgs. 25 & 26).

Thereafter, she had various meetings, conferences and conversations with agents of the Drug Enforcement Administration in Miami, Florida, and Cleveland, Ohio.

That despite the "PLEA BARGAINING AGREEMENT", her testimony before the Grand Jury, and her numerous meetings with the Drug Enforcement Administration, on January 7, 1975, the Federal Grand Jury for the Southern District of Florida, was advised by the Government:

> *"I would please ask when you consider this indictment you completely disregard the testimony of Miss Donahey when she testified before you previously and please base your consideration solely on the details of the investigation as related by Mr. Putsche."* (R, Vol. 1, pgs. 41 & 42; A.)

On January 9, 1975, the Grand Jury indicted DENISE DONAHEY in a three count Indictment, to wit:

> Count I charging a violation of Title 21 U.S.C. §952(a);
>
> Count II charging a violation of Title 21 U.S.C. §841(a)(1); and
>
> Count III charging a violation of Title 21 U.S.C. §844 (R, Vol. 1, pgs. 1 & 2).

DENISE DONAHEY was arraigned, plead not guilty and requested a jury trial. The Government was still undecided as to whether or not they would comply with the terms and conditions of the "PLEA BARGAINING AGREEMENT", and on March 3, 1975, counsel for the Petitioner was notified by Assistant United States Attorney Donald Ferguson, that the Government would proceed to trial on all three counts of the Indictment against her.

Thereafter, DENISE DONAHEY filed her pre-trial motions, including a Motion to Compel Government to Comply and/or Specifically Perform and/or In The Alternative, To Dismiss the Indictment, upon which an evidentiary hearing was held on March 11, 1975. The Court at that time denied the relief requested in the Defendant's motion and the case subsequently went to trial on March 31, 1975.

MISS DONAHEY throughout the trial, consistent with her signed statement and Grand Jury testimony, maintained her innocence and denied that she knowingly and intentionally violated any narcotic laws of the United States and that she had knowledge that she was carrying cocaine in her tote bag. (R, Vol. 2, pgs. 71-74)

During the jury deliberations the following post-instruction inquiry was made to the Court, to-wit:

> "Is it necessary under the interpretation of the law for the jury to determine whether the defendant knew: (1) the smuggled substance was a *controlled substance*, or (2) the smuggled substance was *cocaine* in order to determine guilt to each count of the Indictment?"

After considerable argument by counsel for the Government and Petitioner (R, Vol. 2 pgs. 149-180; A 6-36), the Court answered the jury's inquiry to the effect that in order to establish guilt it was only necessary to find that the Defendant knew that it was a controlled substance. Approximately 30 minutes later the jury returned its verdict and found the Petitioner guilty of Count I and not guilty of Counts II and III respectively. Petitioner was sentenced to 3 years incarceration and 3 years special parole term.

Timely appeal was filed to the United States Court of Appeals 5th Circuit which resulted in the Opinion, Denial for Petition For Re-Hearing, Order granting Petitioner's Application To Stay Mandate giving rise to the filing of the herein Petition for Writ of Certiorari.

REASONS FOR GRANTING WRIT

Petitioner alleges the decision below should be reviewed by this court for the following reasons:

1. *PLEA BARGAINING AGREEMENT*

Shortly after DENISE DONAHEY'S arrest on October 13, 1974, she agreed to co-operate with agents of the Drug Enforcement Administration, hereinafter referred to as DEA, in the prosecution of Vincent Marotta. Pursuant to that co-operation, on October 14, 1974, at approximately 12:40 p.m., she gave a voluntary four page handwritten statement of the details of her involvement with Vincent Marotta and the circumstances surrounding the Colombian

misadventure. This statement was given under the supervision and direction of DEA agents PUTSCHE and TORRES (R, Vol. 2, Pgs. 50, 62-66).

That On October 17, 1974, the Government entered into and executed the following "PLEA BARGAINING AGREEMENT" with DENISE DONAHEY:

> "Denise Donahey hereby agrees to testify before the Federal Grand Jury and to co-operate fully with the United States Attorney and Government Agents concerning the prosecution of VINCENT MAROTTA. In return the United States Attorney agrees to permit DENISE DONAHEY to plead guilty pursuant to Alford v. North Carolina, to a misdemeanor count, 21, U.S.C. §844. The Government will recommend that she be sentenced to one year probation.
>
> Signed: DONALD L. FERGUSON
> Assistant U.S. Attorney
>
> Dated October 17, 1974"

(R, Vol. 1, pg. 28; A, pg. 1)

That pursuant to and in reliance upon the representations contained in the "PLEA BARGAINING AGREEMENT", on October 18, 1974, DENISE DONAHEY appeared before the United States Federal Grand Jury for the Southern District of Florida and testified in detail in reference to this case. Her testimony consisted of some 33 pages of Grand Jury testimony. (R, Vol. 1, pg. 26.)

Thereafter pursuant to and in reliance upon the terms and conditions of the "PLEA BARGAINING AGREEMENT", DENISE DONAHEY had various meetings and conferences with agents of the DEA in Miami, Florida and Cleveland, Ohio.

However, somewhere along the line a disagreement arose between the DEA and DENISE DONAHEY in reference to her cooperation and it was not until approximately March 3, 1975, that the Assistant United States Attorney notified counsel for the Defendant that in all probability the Government would prosecute the Defendant on all three counts of the Indictment and she should prepare to go to trial in this case on March 17th.

On March 6, 1975, the Defendant filed her Motion to Compel the Government to Comply and Specifically Perform and/or In The Alternative, Dismiss the Indictment. That an evidentiary hearing was held on March 11, 1975, in reference to this motion.

That at said evidentiary hearing the Government presented testimony of three witnesses, FRED PUTSCHE, DEA Agent, Miami, Florida; FRANK J. MAGOCH, DEA Agent, Cleveland, Ohio, and THOMAS GESCHKE, Police Officer of the City of Shaker Heights, Ohio.

The testimony presented on behalf of the Government primarily consisted of uncorroborated hearsay statements as to the Defendant's involvement with certain people who were allegedly engaged in narcotic transactions and that several leads given by DONAHEY were not corroborated. VINCENT MAROTTA, the prime suspect, was so well in-

sulated that it was difficult to establish direct connection between MISS DONAHEY and MAROTTA.

The general gist of the testimony by all Government witnesses was that at that particular juncture of the investigation the DEA was disenchanted with MISS DONAHEY'S cooperation because they could not establish definite links between DONAHEY and MAROTTA in order to successfully prosecute their case against VINCENT MAROTTA.

That Defendant contends that the investigation conducted by the DEA in reference to the prosecution of VINCENT MAROTTA was not complete and thorough and in support thereof makes the following allegations:

ALLEGATIONS OF DENISE DONAHEY

1. MISS DONAHEY informed the DEA agents in her written statement taken at the time of her initial interrogation on October 17, 1974, and in her Grand Jury testimony on October 18, 1974, that the man that introduced her to VINCENT MAROTTA was DR. J. RAPISARDA and that they were introduced at the Roman Gardens Restaurant on Mayfield Road in the Cleveland, Ohio area, and that there was a waitress who was a friend of MISS DONAHEY'S who was there at the time of their introduction.

2. MISS DONAHEY stated that she had used various automobiles which were either owned, leased or controlled by VINCENT MAROTTA and/or his corporations and in an effort to substantiate the same, sent Agent PUTSCHE a traffic ticket which she received while driving one of these automobiles.

3. MISS DONAHEY alleged that she and VINCENT MAROTTA visited an apartment in the Cleveland area at various and sundry times.

4. MISS DONAHEY allegedly called her grandmother from the Hilton Hotel in Bogota, Colombia and could not verify this because she had lost or destroyed the hotel bill.

GOVERNMENT'S ANSWER TO DONAHEY'S ALLEGATIONS

1. Approximately six months later on March 11, 1975, the date of the evidentiary hearing on Defendant's Motion to require the Government the Specifically Perform under the "PLEA BARGAINING AGREEMENT", neither DR. RAPISARDA nor the waitress at the Roman Gardens Restaurant were interviewed or contacted in any way. (SR, Agent Putsche's testimony, pg. 26.)

2. That the Cleveland DEA office had subpoenaed records of the Lincoln Mercury dealer in Cleveland, Ohio, but these records were difficult to obtain. (SR, Agent Putsche's testimony, pgs. 25, 26.)

3. That when the initial lead given by DONAHEY to the DEA and the Shaker Heights Police Department was not corroborated and the apartment could not properly be located, no one from either the DEA or the Shaker Heights Police Department ever requested DENISE DONAHEY to accompany them to the apartment house and to point out

the apartment to them. (SR, Agent Putsche's testimony, pgs. 30, 31.) SGT. GESCHKE in fact testified:

> "I was never informed that we had checked the wrong apartment." (SR, Geschke's testimony, p. 12.)

4. That although there was much to-do made by Agent PUTSCHE in reference to the alleged telephone call that DENISE DONAHEY placed to her grandmother from Bogota, Colombia, as of the date of the evidentiary hearing the Bogota office of the DEA did not produce a duplicate hotel bill and "was still checking it out". (SR, Agent Putche's testimony, pg. 17.)

The Government presented testimony from DEA Agent MAGOCH of Cleveland, Ohio who testified as to MISS DONAHEY'S lack of cooperation as a witness in this case. His testimony revealed that DONAHEY complained that she had been receiving harassing telephone calls and that she was followed and assaulted by someone she thought was a police officer in one of the suburban communities surrounding the Cleveland area.

MAGOCH revealed that a check of the license number given to him by MISS DONAHEY checked out to be the automobile owned by a Sargeant of Police on the Lyndhurst, Ohio Police Department. (SR, Agent Magoch's testimony, pg. 5.) On cross-examination when MAGOCH was asked the name of the Lyndhurst policeman, he answered:

> "I believe it was Robinson."

When asked again he said,

> "It was Robinson or it was Patterson." (SR, Agent Magoch's testimony, pg. 9.)

When MAGOCH was asked if Robinson, if that was his name, was still with the Lyndhurst Police Department, he said:

> "I believe he is a lieutenant now." (SR, Agent Magoch's testimony, pg. 10.)

When asked further if he was checking on whether or not Robinson had any connection with MAROTTA, he stated:

> "At this time we are conducting that investigation." (SR, Agent Magoch's testimony, pg. 11.)

It was upon this caliber of testimony that the Court declined to require the Government to comply with the terms and conditions of the "PLEA BARGAINING AGREEMENT" and denied the Defendant's motion.

It is inconceivable to this writer that if in fact the DEA conducted a legitimate investigation in an effort to prosecute VINCENT MAROTTA that they would have such a cavalier attitude about an alleged threat to a government witness in a pending narcotics prosecution. Instead of attempting to prosecute the police officer for intimidating a federal witness or notifying his department, it appears the DEA just dropped the matter and Patterson or Robinson was promoted to the rank of Lieutenant and to this date probably serves in that capacity on the Lyndhurst, Ohio Police Department.

Petitioner alleges that the decision rendered on this issue by the United States Court of Appeals, Fifth Circuit is in direct conflict with the following decision of another Court of Appeals on the same matter and has decided this question in a way in conflict with applicable decisions of the Supreme Court of the United States.

The leading case in the United States in reference to Plea Bargaining Agreements and their utilization in the proper administration of criminal justice, is *Santabello v. New York, 92 S.Ct. 495, 404 U.S. 254*, where the Supreme Court of the United States stated:

> "[5] This phase of the process of criminal justice and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."

See also *United States v. Brown, 500 F.2d 375 Fourth Circuit* in discussing promises made by the prosecution in *State of Florida v. Davis 188 So.2d 24*, the court stated as follows:

> "The courts treat such promises as pledges of the public faith. * * * The promise alleged in the instant plea (that of the prosecuting attorney with the approval of the court) is equally a pledge of the public faith which in our opinion should be duly kept."

In *United States v. Goodrich, 493 F.2d 390, Ninth Circuit at page 393*, which cited the Davis case, supra, the court stated:

> "These cases along with several cited by appellants (concerning breached promises of immunity or fraudulently induced guilty pleas) all generally stand for the proposition that when the prosecution makes a 'deal' within its authority and the defendant relied on it in good faith, the court will not let the defendant be prejudiced as a result of that reliance."

That based upon the factual allegations adduced at the evidentiary hearing and the Government's half-hearted investigation in their effort to prosecute VINCENT MAROTTA, to deny the Petitioner the benefits promised under the "PLEA BARGAINING AGREEMENT" was a clear abuse of her constitutional rights guaranteed to her under the Fifth Amendment of the Constitution of the United States.

The mere fact that the Government could not or would not substantiate the Petitioner's efforts to co-operate, was insufficient grounds as a matter of law to invalidate the agreement in view of DONAHEY'S performance under the terms of the contract, to-wit: her signed statement upon initial interrogation, her telephone call to MAROTTA from the Marriott Hotel, Grand Jury testimony, various meetings with DEA agents in Miami, Florida and Cleveland, Ohio, and her willingness to place electronic equipment upon her body and attempt to engage in conversation with the prime suspect, VINCENT MAROTTA. (SR, Agent Putsche's testimony pgs. 14, 15.)

The Court, in denying the Petitioner's Motion to Compel the Government to Comply and/or Specifically Perform and/or In the Alternative, To Dismiss the Indictment, denied her due process and commited fundamental error.

2. *EQUITABLE IMMUNITY*

That pursuant to and in reliance upon the representations contained in the "PLEA BARGAINING AGREEMENT", DENISE DONAHEY appeared before the United States Federal Grand Jury for the Southern District of Florida on October 18, 1974, and testified (her testimony consisting of some 33 pages before the Grand Jury), she was in effect immunized and/or granted equitable immunity which would bar prosecution in the instant case. MISS DONAHEY appeared before the Grand Jury and received no cautionary instructions whatsoever advising her that she was not compelled to testify and/or that if she did testify, her testimony could be used against her as the basis of an indictment and or in a subsequent criminal prosecution. This was a clear violation of her Fifth Amendment rights guaranteed to her under the Constitution of the United States.

In the *United States vs. Donahey 529 Fed. 2nd 831* Case # 75-2376 dated April 5, 1976 the opinion characterized Donahey's testimony before the Grand Jury as follows:

> "Donahey testified freely before a Grand Jury on matters which were self-incriminatory. She was not given any cautionary warnings."

This is a completely erroneous conclusion overlooking the undisputed fact, that the inducements and representations set forth in the Plea Bargaining Agreement formed the basis and was the compelling reason that caused DONAHEY to testify. Certainly on October 18, 1974, the date she testified, the government elicited her co-operation under what they considered to be a valid Plea Bargaining Agreement entered into in good faith.

The terms and conditions of the Plea Bargaining Agreement explicitly provide that in return for DONAHEY testifying before the Grand Jury and fully co-operating with the Government she would be allowed to plead guilty to a misdemeanor, based upon this inducement she testified and therefore under no circumstances could said testimony be free and voluntary.

This opinion seems to have overlooked the fact that the Grand Jury did not indict DONAHEY until *January 9, 1975*, and then only when they were instructed by the Assistant United States Attorney "to completely disregard the testimony of Miss Donahey when she testified before you previously."

It is beyond the comprehension of counsel how the Court of Appeals, Fifth Circuit, can come to the conclusion that DONAHEY'S testimony before the Grand Jury was "self-incriminatory," when Petitioner's Grand Jury testimony was not included in the record on appeal nor has the Court of Appeals ever read the same. Petitioner alleges that said testimony is *exculpatory* rather than incriminatory.

However, the fact remains that the Petitioner did testify before the Grand Jury based upon the inducements and representations contained in the Plea Bargaining Agreement.

She testified without receiving any cautionary instructions whatsoever.

Petitioner acknowledges that no formal application for immunity was made under the provisions of Title 18, U.S.C. § 6002, but none was necessary.

Petitioner alleges that the Opinion of the Fifth Circuit Court of Appeals rendered herein conflicts with the Opinion rendered by the Third Circuit Court of Appeals, *United States vs. Levy 153, 2d, 995* and relies upon the following language of that case to establish her claim for equitable immunity:

> "Since ancient times, government officials have been granting accomplices immunity from prosecution in return for testimony as to the criminal transaction. In the United States the courts have held that only an equitable right to immunity exists unless a statute expressly authorizes a grant of immunity in a particular situation".

The Petitioner therefore urges that under the facts and circumstances of the instant case, she was granted equitable immunity and/or the Government should have been estopped from prosecuting her except under the terms and conditions set forth in the "Plea Bargaining Agreement."

3. *NO CAUTIONARY WARNINGS*

The Fifth Circuit opinion (supra) stated:—

> "DONAHEY testified freely before a Grand Jury on matters which were self-incriminatory. She was not given any cautionary warnings . . . ."

The opinion further stated:

> "Although failing to inform the defendant of her rights was an error, it was a harmless error. . . ."

Petitioner contends that if she had no "cautionary warnings", that her testimony could be used against her to form the basis of an indictment and/or in a subsequent criminal prosecution, and if in fact her testimony was, as characterized by the Fifth Circuit "self-incriminatory" she was denied basic rights guaranteed to her by the Fifth Amendment of the United States Constitution. The Grand Jury was subsequently instructed on January 7, 1975 to disregard the Petitioner's testimony in considering her indictment. The plain facts are the Grand Jury heard the "self-incriminatory" testimony of the Petitioner and it formulated the basis of probable cause used to indict Petitioner. It logically follows that the Petitioner was substantially prejudiced before the Grand Jury and did not receive the fair and impartial treatment guaranteed to her in violation of her fundamental rights of due process.

DONAHEY, *a potential Defendant* was not given any cautionary warnings whatsoever prior to her testifying before the Federal Grand Jury which subsequently indicted her.

Therefore, the question before this court is whether the Fifth Amendment of the United States Constitution requires cautionary warnings be given to a potential defendant prior to their testifying before a Federal Grand Jury.

Petitioner alleges that this is an important question of Federal law which has not been, but should be settled by the Supreme Court of the United States, and in support thereof relies on the recent case of the *United States vs. Mandujano, Case No. 74-754* decided by this court May 19, 1976,

Footnote 7

> "The fact that warnings were provided in this case to advise respondent of his Fifth Amendment privilege *makes it unnecessary to consider whether any warning is required, as the Government asks us to determine*; in addition to the warning implicit in the oath, federal prosecutors apparently make it a practice to inform a witness of the privilege before questioning begins"

The proper administration of justice in the Federal courts of this nation require that this court decide this most important Federal question which has not been settled but should be by this court.

4. *PETITIONER'S GRAND JURY TESTIMONY & INDICTMENT*

Petitioner alleges that the Government misled and/or confused the Grand Jury when said jury was advised

before considering the Indictment of the Petitioner to completely disregard the testimony of DENISE DONAHEY taken before said Grand Jury on a previous occasion. (Said testimony consisted of approximately 33 pages).

On January 7, 1975, Assistant United States Attorney who signed the Plea Bargaining Agreement with Donahey on October 17, 1974 made the following statement to the Grand Jury:

> *"I would please ask when you consider this Indictment that you completely disregard the testimony of Miss Donahey when she testified before you previously and please base your consideration solely on the details of the investigation as related by Mr. Putsche."*

A juror asked:

> *"Why should we disregard that?"*

To which the Assistant United States Attorney answered:

> *"She was a defendant. She was not read her rights when she appeared before you previously. To avoid any type of complication at another time I would ask you to completely disregard her testimony."* (R, Vol. 1, pgs. 41, 42)

Thereafter, on January 9th, 1975 the Petitioner was indicted in a three count Indictment. Prior to the return of said Indictment, the Grand Jury was never advised that this Petitioner had entered into a "PLEA BAR-

GAINING AGREEMENT" with the Government and therefore that information, essential to the fair and impartial deliberations of the Grand Jury, was withheld from their consideration.

This Petitioner does not know whether the Grand Jury considered her testimony exculpatory and/or incriminatory and when the jury was improperly advised to *completely disregard her testimony*, she was substantially prejudiced before that jury.

If the Grand Jurors considered said statement an exculpatory statement and exclused it from their deliberations, they were in fact confused and misled. If, on the other hand, they considered the statement incriminatory and the Petitioner was not advised of her rights under the Fifth Amendment of the Constitution, then the incriminatory evidence was heard by the jury in violation of the Petitioner's rights guaranteed to her under the Fifth Amendment of the Constitution of the United States.

The Government's statement so prejudiced the Grand Jury against DENISE DONAHEY that their deliberations were not fair and impartial, and this violates fundamental due process. This error so permeated the Grand Jury deliberations as to infect the proceedings to such a degree that the Indictment should have been dismissed, and the matter fairly presented to a new Grand Jury.

Petitioner alleges that the Fifth Circuit Court of Appeals opinion in this case came to the erroneous conclusion:

> " . . . (2) an accused has no right to appear before the Grand Jury to state her case; (3) there was sufficient evidence from the testimony of other witnesses from which the Grand Jury could deduce probable cause . . ."

which conclusion is in direct conflict with the opinion rendered in this court in the *United States v. Dionisio 410 U.S. 1, 93 S.Ct. 764*, where this court stated:

> "The Fifth Amendment guarantees that no civilian may be brought to trial for an infamous crime "unless on a presentment or indictment of a Grand Jury." This constitutional guarantee presupposes an investigative body "acting independently of either prosecuting attorney or judge," Stirone v. United States, 361, U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252, *whose mission is to clear the innocent, no less than to bring to trial those who may be guilty.* Any holding that would saddle a Grand Jury with mini-trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws."

The position of the Petitioner was recently reaffirmed in this court's opinion rendered in *United States*

vs. Mandujano, Case No. 74-754 rendered May 19, 1976 when in footnote 9 it was stated as follows:

Footnote 9

"This is not to suggest that the questioning would have been improper if the principal aim of the Grand Jury's investigation had centered upon respondent's activities, rather than a general investigation into local narcotics traffic. As previously indicated, no impropriety results from summoning the target of its inquiry; United States v. Dionisio, 410, U.S. at 10 n. 8; *it is appropriate in fact, to give that individual an opportunity to explain potentially damaging information before the Grand Jury decides whether to return an Indictment.*"

It is obvious that the opinion rendered by the Fifth Circuit Court of Appeals in this case completely misconstrued the position of the Petitioner before the Grand Jury, because the United States Attorney in answering the Grand Jurors inquiry as to why they should disregard DONAHEY'S testimony before considering the indictment, referred to her as a *defendant when she initially testified before the Grand Jury* on October 18, 1974.

If DONAHEY was in fact a potential Defendant she should have been afforded cautionary warnings.

If on the other hand, Donahey's testimony was exculpatory and she was called before the Grand Jury, that testimony should have been considered to explain away potentially damaging information before the Grand Jury

decided to return an Indictment. Therefore if the Grand Jury failed to consider exculpatory testimony of a potential defendant which would have explained away potentially damaging information that potential Defendant was substantially prejudiced in the Grand Jury deliberations.

Under the facts and circumstances herein delineated, the Petitioner alleges that she did not receive fair and impartial consideration of her case before the Grand Jury which indicted her in violation of her rights to due process guaranteed under the Fifth Amendment of the United States Constitution.

5. *POST JURY INQUIRY*

Prior to the jury retiring to consider its verdict, the Court in its jury instructions charged, that in order for the Government to prove the Defendant guilty of the offenses as alleged, the Government must prove the following essential elements of the offenses beyond and to the exclusion of a reasonable doubt:

AS TO COUNT I

"One, that the defendant, Denise Donahey, imported the cocaine into the United States from anyplace outside the United States and

Two, that the defendant, Denise Donahey, so *imported the cocaine knowingly and intentionally*, and that she knew the substance was a narcotic controlled substance." (R, Vol. 2, pg. 134)

AS TO COUNT II

"The possession required under Count II of this Indictment must be a knowing possession. This means that it must be established that the defendant *knowingly* had the cocaine within her possession and that *she knew it was cocaine.*" (R, Vol. 2, p. 136)

AS TO COUNT III

"(1) the defendant possessed a quantity of *cocaine*, a controlled substance, and (2) the defendant possessed the *cocaine knowingly* and intentionally." (R, Vol. 2, pg. 138).

Thereupon, after considerable deliberation the court received the following post instruction inquiry from the Jury, in a note which reads:

"Your Honor, is it necessary under the interpretation of the law for the jury to determine whether the defendant knew: (1) the smuggled substance was a *controlled substance*, or (2) the smuggled substance was *cocaine* in order to determine guilt to each count in the Indictment?"

After approximately 32 pages of argument (R, Vol. 2 pgs. 149-180), the Court answered the Jury's inquiry to the effect that in order to establish guilt it was only necessary to find that the Defendant knew it was *a controlled substance.*

Subsequently, the jury returned its verdict. It found DONAHEY guilty to Count I and not guilty as to Counts II and III as charged in the Indictment.

It is apparent that the principle issue before the Fifth Circuit Court of Appeals was whether under the facts as elicited by the testimony in this case the Government adduced sufficient evidence to convict DONAHEY of the allegations as alleged in Count I of the Indictment.

It is obvious that the Court's initial instructions as to the degree of DONAHEY'S knowledge required to convict her under the allegations of the Indictment were in conflict with the answer he gave to their post-instruction inquiry.

Throughout the initial charge the Court emphasized that in order to convict DONAHEY under any of the Counts of the Indictment, the Government had to prove beyond and to the exclusion of a reasonable doubt, the essential elements that DONAHEY *knowingly and intentionally* imported and/or possessed *cocaine*, which happens to be a controlled substance.

Petitioner therefore contends that the jury was confused and misled by the court's inconsistent answer to the jury's post-instruction inquiry. The jury acquitted DONAHEY of Count II and Count III of the Indictment. In convicting her of Count I thereof, the Jury did so on a *lesser degree of proof* that was required under the law and the initial jury instructions.

Therefore, the evidence to convict was insufficient as a matter of law, and the court's misleading answer to the jury's post-instruction inquiry is a substantial violation of the Petitioner's Fifth Amendment right to due process.

Petitioner takes the position that the Fifth Circuit Court of Appeals opinion in this case is in direct conflict with the following cases decided by the United States Court of Appeals for the Second Circuit:

> *United States vs. Lasaiandra 421 Fed 2d 1261* and *United States vs. Christman 298 Fed 2d 651.*

which cases required that in order to convict, the defendant must have had specific knowledge of the narcotic substance imported.

CONCLUSION

WHEREFORE due to the errors encompassed by the five principal issues presented herein, Petitioner alleges that the sum totality of their impact upon the Petitioner's rights guaranteed to her under the Fifth Amendment of the Constitution of the Unite. States so violated fundamental fairness as to have denied to her due process herein and therefore requests this court accept jurisdiction and issue its Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit.

Respectfully submitted,

KOEPPEL, STARK &
NEWMARK
Attorneys for Petitioner
1135 DuPont Building
169 East Flagler St.,
Miami, Florida 33131.

By /s/ Arthur B. Stark
ARTHUR B. STARK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the above and foregoing Petition for Writ of Certiorari were mailed to: Office of the UNITED STATES ATTORNEY, 300 Ainsely Building, Miami, Florida, 33132, Attention: DONALD L. FERGUSON, Assistant United States Attorney, and three (3) copies were mailed to THE SOLICITOR GENERAL OF THE UNITED STATES, Department of Justice, Washington, D.C. 20530, this 1st day of June, 1976.

/s/ Arthur B. Stark

ARTHUR B. STARK

APPENDIX

CORRECTED

UNITED STATES of America,
Plaintiff-Appellee,

v.

Denise DONAHEY,
Defendant-Appellant.

No. 75-2376.

United States Court of Appeals,
Fifth Circuit.

April 5, 1976.

Defendant was convicted in the United States District Court for the Southern District of Florida at Miami, Peter T. Fay, J., of importation of cocaine and she appealed. The Court of Appeals held that district court did not err in refusing to require specific performance by the Government of plea bargaining agreement where defendant failed to live up to her part of the agreement; that defendant was not entitled to equitable immunity by reason of testimony given before grand jury in reliance on plea bargaining agreement; and although it was error to fail to inform defendant of her right to remain silent when she appeared before grand jury, error was harmless where the indictment was drawn, and subsequent prosecution proceeded, without reliance on or reference to the grand jury testimony.

Affirmed.

1. Criminal Law ⇐273.1(2)

Trial court did not err in refusing to require specific performance by the Government of plea bargaining agreement pursuant to which defendant, apprehended in possession of cocaine, would be permitted to plead guilty to a misdemeanor, where defendant failed to live up to her part of the agreement. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1002(a), 21 U.S.C.A. § 952(a).

2. Criminal Law ⇐42

Immunity in exchange for testimony is obtainable only by way of a grant from the district court. 18 U.S.C.A. § 6003.

3. Criminal Law ⇐42

Defendant who was not given any cautionary warning before she testified before grand jury on matters which were self-incriminatory was not entitled to equitable immunity where defendant appeared and answered questions voluntarily in reliance on plea bargaining agreement which she violated and grand jury testimony was not considered by the grand jury or used against defendant at trial. 18 U.S.C.A. § 6003.

4. Criminal Law ⇐1166(2)

Failure to inform defendant of her right to remain silent before grand jury was harmless error where the indictment was drawn, and subsequent prosecution proceeded, without reliance on or reference to the grand jury testimony.

5. Grand Jury ⇐35

An accused has no right to appear before the grand jury to state her case.

6. Criminal Law ⇐863(2)

Response to jury's postinstruction inquiry properly stated the mens rea requirements of statute pertaining to importation of a controlled substance. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1002(a), 21 U.S.C.A. § 952(a).

Appeal from the United States District Court for the Southern District of Florida.

Synopses, Syllabi and Key Number Classification
COPYRIGHT © 1976, by WEST PUBLISHING CO.

The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

INDEXED

A.

BEST COPY AVAILABLE

36

Before GEWIN and AINSWORTH, Circuit Judges, and MARKEY *, Chief Judge.

PER CURIAM:

Defendant Denise Donahey appeals from her conviction on Count 1 of the indictment which charged her with violation of 21 U.S.C. § 952(a). We affirm.

Issues

Defendant asserts that the District Court erred when in (1) failed to require specific performance of a Plea Bargaining Agreement, (2) failed to grant defendant equitable immunity for her Grand Jury testimony, (3) failed to dismiss the indictment because of a denial of fair and impartial consideration before the Grand Jury and (4) misstated the law in its answer to a post-instruction inquiry.

(1) *Plea Bargaining Agreement*

Donahey was apprehended and found in possession of cocaine. Soon after her arrest the Government entered a Plea Bargaining Agreement with her, signed by the Assistant U. S. Attorney, whereby in exchange for testimony before the Federal Grand Jury and for full cooperation in the prosecution of one Vincent Marotta, the Government would permit Donahey to plead guilty to a misdemeanor and would recommend a sentence of one year probation. Before the trial, the Government indicated that it would prosecute her on all counts of the indictment. At a pre-trial hearing the Government produced several witnesses who testified that Donahey had given evasive and misleading answers, had given answers which could not be verified, and, on numerous occasions, had refused to answer questions at all.

[1] The District Court had ample basis, therefore, for concluding that Donahey had failed to live up to her part of the Plea Bargaining Agreement, thus freeing the Government from its pledge. We find no error in the District Court's refusal to require specific performance by the Government of the Plea Bargaining Agreement.

(2) *Equitable Immunity*

Donahey testified freely before a Grand Jury on matters which were self-incriminatory. She was not given any cautionary warnings.

In returning the indictment against Donahey, however, the Grand Jury was instructed not to consider her testimony and at trial none of her Grand Jury testimony was used against her. She was in no way prejudiced, therefore, by her testimony or by the lack of cautionary warnings.

[2, 3] Immunity in exchange for testimony is obtainable *only* by way of a grant from the District Court, 18 U.S.C. § 6003. Donahey knew, as evidenced by the Plea Bargaining Agreement, that she was subject to prosecution on the matters to which she was testifying before the Grand Jury. She appeared and answered questions voluntarily. Donahey says she did so in reliance on the Plea Bargaining Agreement, yet it was she, not the Government, who by her own actions violated the Plea Bargaining Agreement. That fact and the non-use of her Grand Jury testimony against her cause us to agree with the District Court that Donahey was not entitled to equitable immunity.

(3) *Indictment*

[4, 5] In requesting an indictment against Donahey, the Assistant United

* Of the U. S. Court of Customs and Patent Appeals, sitting by designation.

38

States Attorney, realizing that she had not been informed of her right to remain silent, told the Grand Jury to disregard Donahey's testimony. Although failing to inform the defendant of her rights was an error, it was a harmless error, because (1) she was well aware that she was the subject of a criminal investigation and prosecution, and voluntarily testified; (2) an accused has no right to appear before the Grand Jury to state her case; (3) there was sufficient evidence from the testimony of other witnesses from which the Grand Jury could deduce probable cause; and (4) her testimony was not used against her at the subsequent trial. Because her indictment was drawn, and subsequent prosecution proceeded, without reliance on or reference to her Grand Jury testimony, she was not prejudiced and the District Court did not err in failing to dismiss the indictment.

(4) *Post-Instruction Inquiry*

[6] The District Court's response to the jury's post-instruction inquiry was that the *mens rea* requirements of 21 U.S.C. § 952(a) are (1) that the importation be knowingly and intentionally made and (2) that she knew the imported substance, stipulated to be cocaine, was a controlled substance. That response was an accurate statement of the applicable law and was consistent with the jury instructions.

Accordingly, the judgment below is *affirmed* in all respects.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

App. B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1975

No. 75-2376

C. C. Docket No. CR-75-13-PF
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DENIS DONAHEY,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Florida

JUDGMENT

Before GEWIN, and AINSWORTH, Circuit Judges, and MARKEY*, Chief Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 5, 1976

Issued as Mandate:

---

*Of the U. S. Court of Customs and Patent Appeals, sitting by designation.

[TITLE OMITTED]

[Filed May 3, 1976]

ON PETITION FOR REHEARING
(MAY 3, 1976)

Before GEWIN and AINSWORTH, Circuit Judges, and MARKEY,* Chief Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

*Of the U. S. Court of Customs and Patent Appeals, sitting by designation.

[TITLE OMITTED]

[Filed May 17, 1976]

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is stayed to and including June 2, 1976, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Howard T. Markey

CHIEF JUDGE, U. S. COURT OF CUSTOMS and PATENT APPEALS
14 May 1976